



# **DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM PLAN**

Fiscal Year 2014

Michael Hancock, Secretary  
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Office for Civil Rights and Small Business Development

Revised FY 2014

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## **I. INTRODUCTION**

The Kentucky Transportation Cabinet (Transportation Cabinet), in accordance with the requirements of 49 Code of Federal Regulations Part 26 (49 CFR 26), has developed the Kentucky Disadvantaged Business Enterprise Program (DBE Program) for the purpose of leveling the playing field for DBEs with respect to projects funded in whole or part by the US Department of Transportation (USDOT or DOT). The provisions of the Transportation Cabinet's DBE Program shall apply to all recipients and subrecipients, including contractors and subcontractors, of Federal highway funding under Titles I (other than Part B) and V of the Inter-modal Surface Transportation Efficiency Act (ISTEA) of 1991; Titles I, III and V of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21); Federal transit funds authorized by Titles I, III and V of TEA-21 and airport funds authorized by 49 U.S.C. 47101, *et. seq.*

The Transportation Cabinet has conducted a DBE Program since 1982. The program has functioned as an integral component of its federal highway construction program by providing the impetus for increasing the participation of minorities and women in contracting opportunities funded by USDOT. This program extends the commitment of the Transportation Cabinet to provide equal opportunity to all contractors, subcontractors, consultants and sub-consultants qualified to perform on USDOT assisted contracts.

This program document supersedes any previously issued policy or procedural statements that may conflict with its content. In the event that any language within this program document conflicts with the regulations found at 49 CFR 26, the regulations shall have primary authority.

## II. POLICY STATEMENT (49 CFR 26.23)



Steven L. Beshear  
Governor

TRANSPORTATION CABINET  
Frankfort, Kentucky 40622  
www.transportation.ky.gov/

Michael W. Hancock, P.E.  
Secretary

### DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM POLICY STATEMENT

OFFICIAL ORDER 107330

The Kentucky Transportation Cabinet ("Cabinet") agrees to a policy of nondiscrimination in the award and administration of United States Department of Transportation ("USDOT")-assisted contracts in its Federal highway, transit and airport financial assistance program.

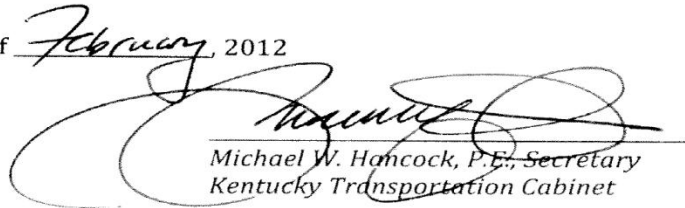
The Cabinet has established a narrowly-tailored disadvantaged business enterprise ("DBE") program, in accordance with applicable law, for the purpose of (a) creating a level playing field on which DBEs can compete fairly for USDOT-assisted contracts; (b) ensuring that only firms that fully meet the eligibility standards are permitted to participate as DBEs; (c) helping to remove barriers to the participation of DBEs in USDOT-assisted contracts; (d) assisting the development of firms that can compete successfully in the marketplace outside the DBE program, and (e) providing appropriate flexibility to sub-recipients and contractors in establishing and providing opportunities for DBEs.

Furthermore, the Cabinet, its sub-recipients, contractors and subcontractors shall not discriminate on the basis of race, color, religion, national origin, sex, sexual orientation or gender identity, ancestry, age, disability or veteran status in the award and performance of USDOT-assisted contracts or in the administration of its DBE program or the requirements of 49 CFR Part 26.

The Cabinet shall take all necessary and reasonable steps under 49 CFR Part 26 to implement this policy with its sub-recipients, contractors and subcontractors.

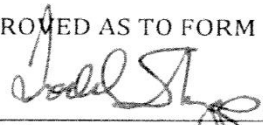
This policy shall be prominently posted throughout the Cabinet and to the DBE and non-DBE business communities that perform work on the Cabinet's USDOT-assisted contracts.

Signed and approved this 10<sup>th</sup> day of February, 2012



Michael W. Hancock, P.E., Secretary  
Kentucky Transportation Cabinet

APPROVED AS TO FORM AND LEGALITY



Todd Shipp, Esq., Special Assistant  
Office of Legal Services



An Equal Opportunity Employer M/F/D

Revised August 2014

### **III. ASSURANCES**

(49 CFR 26.13)

Each financial assistance agreement the Transportation Cabinet signs with a USDOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE Program or the requirements of 49 CFR 26. The recipient shall take all necessary and reasonable steps under 49 CFR 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. The recipient's DBE Program, as required by 49 CFR 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under 49 CFR 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq*).

Each contract the Transportation Cabinet signs with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

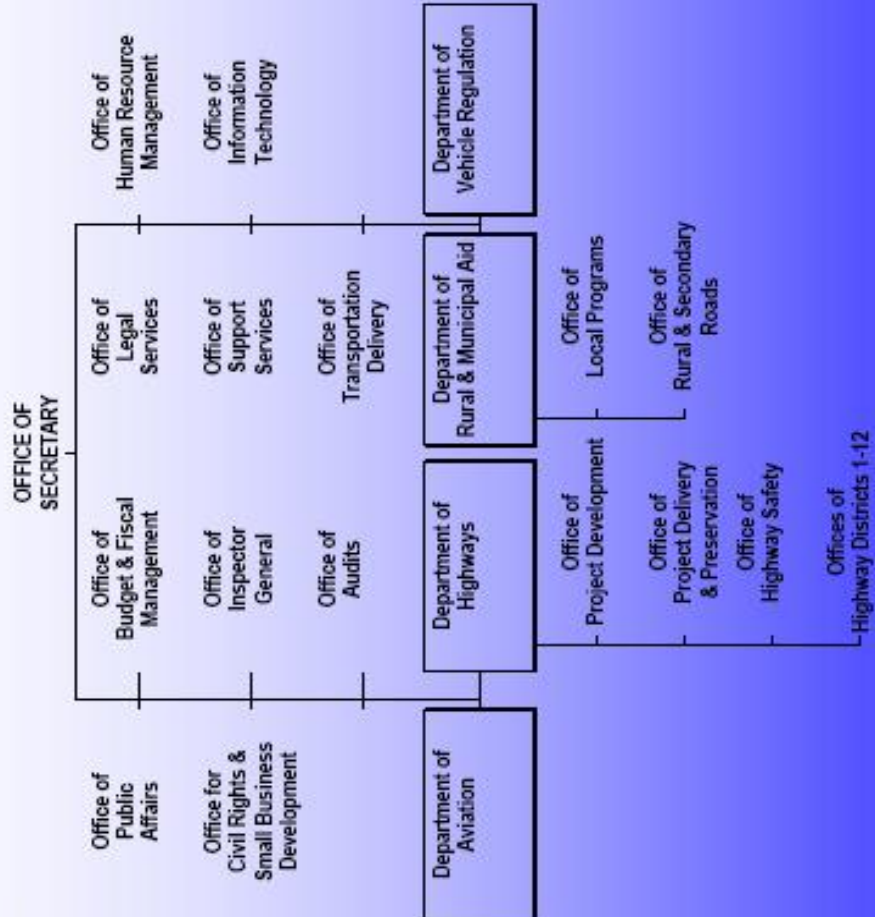
The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

#### **IV. ADMINISTRATION**

The Disadvantaged Business Enterprise (DBE) Program is located in the Small Business Development Branch within the Office for Civil Rights and Small Business Development (OCRSBD). A Kentucky Transportation Cabinet organizational chart displaying the Cabinet's structure and an organizational chart of the OCRSBD is provided on the following pages.



## Executive Offices & Departments



EO-1

06-16-2008





EXECUTIVE OFFICES

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Office for Civil Rights & Small Business Development



EO-11

06-16-2008

## **DBE Liaison Officer**

(49 CFR 26.25)

The Executive Director of the Office for Civil Rights and Small Business Development (OCRSD) shall make a recommendation to the Secretary of the Transportation Cabinet who will appoint a DBE Liaison Officer (DBELO). The DBELO shall be responsible for implementing all aspects of the Transportation Cabinet's DBE Program and ensuring that the Transportation Cabinet complies with all provisions of 49 CFR 26. The DBELO shall have direct and independent access to the Secretary of the Transportation Cabinet concerning DBE Program matters.

The DBELO can be reached at 502-564-3601 in the OCRSD of the Kentucky Transportation Cabinet located at 200 Mero Street, Sixth Floor, Frankfort, Kentucky 40622.

The duties of the DBELO include, but are not limited to:

- Communication with the Federal Highway Administration concerning the operation of the Transportation Cabinet's DBE Program;
- Keeping the Secretary of the Transportation Cabinet informed concerning the workings and status of the DBE Program;
- Compilation of reports required by the Federal Highway Administration;
- Communication with DBEs and non-DBEs concerning the requirements of the DBE Program;
- Management of the compilation of information required for the certification of DBEs;
- Preliminary investigation of complaints about the performance and activities of DBEs; and
- Coordinating the Unified Certification Program (UCP).

## **Responsibilities of the Office for Civil Rights and Small Business Development**

The Office for Civil Rights and Small Business Development (OCRSBD) is dedicated to the promotion and protection of the civil rights of employees and applicants for employment within the Transportation Cabinet, along with ensuring that disadvantaged businesses have the maximum opportunity to participate in the DBE Program, as mandated by 49 CFR 26.

The OCRSBD has the following responsibilities regarding the DBE Program:

1. DBE Certification

The OCRSBD is primarily responsible for the processing of DBE certification applications. The OCRSBD conducts on-site reviews of DBE firms and compiles a factual report of the information collected concerning applicants for DBE certification for presentation to the DBE Certification Committee. Applications for DBE certification are processed through OCRSBD. The OCRSBD may receive assistance in processing applications from the Division of Construction Procurement and the Division of Construction.

2. Records Retention

600 KAR 4:010 Section 6(3)

The OCRSBD shall retain all records related to a certified DBE firm for a period of not less than three (3) years from the date of the notice of certification.

3. Supportive Services

The OCRSBD provides supportive services to DBEs and potential DBEs free of charge. These services range from group seminars covering practical issues related to the highway construction business to individual counseling. The intent of OCRSBD's supportive services efforts is to assist DBEs in developing the technical and business management skills necessary to succeed in the transportation industry in accordance with 49 CFR 26.51.

For information concerning available assistance and schedules of upcoming activities, check the OCRSBD website at <http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development> or by telephone at 502-564-3601.

4. Reporting Requirements

The OCRSBD is responsible for the compilation of information and preparation of reports required to be submitted to the USDOT in accordance with 49 CFR 26.

5. Setting Project Goals

Below are the basic procedures for setting goals on KYTC projects requiring a DBE goal. The goal setting committee consists of three (3) members, one (1) each from Construction Procurement, Permits Branch and Office for Civil Rights. Construction

Procurement provides a copy of the field estimate to each committee member prior to the goal setting committee meeting. Each member uses their unique expertise and resources as they review the project line item by line item, in order to make individual recommendations and determine which tasks DBEs can perform.

During each meeting, members bring their recommendations and prepare to explain the rationale for each. The OCRSBD member ensures the directory is updated monthly to allow members to have access to the most up-to-date information of available DBEs on the website. Members then proceed to discuss each project and what items are to be included to make up the goal recommendation. If the members' numbers differ greatly, each member then explains why he/she included or excluded certain items as being something that a DBE could perform. This time is used to determine if there is a special circumstance or additional information that one has that the others do not, which may have impacted recommendations.

The goal setting committee attempts to reach a consensus with the understanding that it must set attainable goals that will meet the overall goal of x%. However, these goals must not be proposed without a strong consideration of safety, quality or ethics. The committee then finalizes the goals and all members agree upon said goals. Construction Procurement captures the goals in writing and forwards them for final approval to the State Highway Engineer. Construction Procurement keeps the final data. Because the information is sensitive, the individual members shred their copy of the field estimate.

## **Financial Institutions**

(49 CFR 26.27)

The Cabinet will survey the financial institutions within the state on an annual basis to identify those institutions that are owned and controlled by socially and economically disadvantaged individuals. For those institutions identified as being owned and controlled by socially and economically disadvantaged individuals, the Transportation Cabinet will investigate the services provided, compile the data and make all reasonable efforts to encourage the utilization of these services by prime contractors and subcontractors whenever possible.

## **Program Development**

The Cabinet will implement all of the provisions of 49 CFR 26 and of this DBE Program Plan consistent with USDOT requirements. All significant program changes will be submitted to the operating administration affected and the Federal Highway Administration for approval.

## **DBE Directory**

(49 CFR 26.31)

The Cabinet shall maintain and make available a current directory of all firms eligible to participate in the DBE Program. The DBE directory shall be updated monthly, published on the Transportation Cabinet's website at <http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/Certified-DBE-Directory.aspx> and will identify eligible DBE certified and prequalified firms by type of work certified to perform, address and telephone number. This directory shall also include certified material suppliers, trucking and related service providers eligible to participate in the DBE program.

## **Bidders List**

(49 CFR 26.11)

The purpose of the Bidders List is to provide accurate data about DBE and non-DBE contractors and subcontractors who seek to work on Federally-assisted contracts. The Cabinet shall maintain the list and utilize it to assist in setting overall goals. The list shall consist of all DBE and non-DBE firms prequalified to do business with the Cabinet. Prequalified contractors include all prime and subcontractors that have expressed they are ready, willing and able to do business with the Cabinet in accordance with state laws.

The Cabinet will maintain the Bidders List which will provide the following information:

- (a) Firm name;
- (b) Firm address;

- (c) Firm's status as a DBE or non-DBE;
- (d) Age of firm; and
- (e) Annual gross receipts of the firm.

In addition, the Cabinet shall collect from each prime contractor at the time of bid submission, the firm names, addresses and contact persons of all DBE firms who have been asked to bid and shall identify all DBE firms who submitted bids for work on the subject contract.

Prime contractors shall be required to list on the General DBE Participation Plan, the names of all DBEs who submitted bids for each contract on which they are successful. To supplement the information, the Transportation Cabinet may conduct a survey of certified DBEs concerning the number and the type of Transportation Cabinet contract(s) on which they have submitted written bids for the preceding construction season.

The OCRSBD, in coordination with the Division of Construction Procurement and the Division of Construction, will maintain and update the Bidders List by reviewing the records of the Prequalification Section of the Division of Construction Procurement. All the above data is on file with the Division of Construction Procurement and OCRSBD and any contractor (prime or sub) failing to provide any of the required data may not be allowed to work on any contracts with the Transportation Cabinet.

## **V. PROGRAM GOAL**

The national goal, which is an aspirational goal for the DBE Program, is not less than ten percent (10%) of federal transportation funds (49 CFR 26.41) authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and Titles I, III and V of the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21).

The federal government does not dictate the amount of the goal (49 CFR 26.41c), therefore, the Cabinet must set an overall goal for its DBE Program in accordance with 49 CFR 26.45. In addition, the DBE Program does not set quotas for DBE participation, nor is it a set-aside program (49 CFR 26.43).

The Cabinet has established a DBE Program goal for USDOT-assisted contracts and it can be found on the website under notice of DBE goals. <http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/SmallBusinessHome.aspx>

### **Procedures for Setting the Annual Overall Goal**

In accordance with 49 CFR 26.45(c), the Cabinet derives the overall DBE Program goal utilizing the USDOT recommended three-step procedure. This procedure assists state recipients in setting fair and equitable DBE goals and allows for the individual states to make adjustments for an individual state's circumstances. This guide is published on the USDOT's web page titled, *Tips For Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*. <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

The first of the three-step process establishes a baseline that considers the degree of representation of DBE firms in the state's competitive highway construction environment. The second step allows for adjustment of this baseline to accommodate situational differences that may occur from state to state, from year to year. The third step establishes race/gender-neutral and race/gender-conscious categories to give an indication of how the overall goal is best implemented and accomplished. The goal-setting steps are discussed in further detail below.

Kentucky Transportation Cabinet  
Goal Setting Methodology  
Federal Fiscal Year (FY) 2010

**(A). Overall Goal for DBE Participation**

As outlined in 49 CFR Part 26, Section 26.45 of the Disadvantaged Business Enterprise (DBE) regulations, the Kentucky Transportation Cabinet (Cabinet) has employed several techniques to comply with the goal-setting provisions in order to engage the participation of DBEs in the state assisted contracting program. The Cabinet expects to meet the goal from participation through race neutral means and participation through race conscious means.

**(B). Step One:**

**Base Figure for the Relative Availability of  
Disadvantaged Business Enterprises (DBE)**

The baseline figure is determined by calculating the number of Kentucky DBE firms who have expressed their readiness, willingness and ability to perform work on federally-assisted projects in the state. "Ready, willing and able," as referenced in 49 CFR 26.45, is considered by the Kentucky Transportation Cabinet (KYTC) to be certified DBE firms and who have been pre-qualified to perform work as contractors or consultants. The baseline is established by dividing the number of pre-qualified and certified DBE firms by the total number of firms that are pre-qualified.

The KYTC has determined the number of "ready, willing and able" firms by using the list of pre-qualified professional service firms and highway construction contractors and subcontractors. All such firms must be determined to be financially qualified and have professional experience to do business with the state before submitting bids on any project issued by KYTC in accordance with KRS Section 176.140 and its regulations.

Considering the three categories of contracts (Construction, Professional Services and Right of Way/Utilities), the formula becomes:

$$\frac{\text{DBE contractors and subcontractors} + \text{DBE consultants} + \text{DBE appraisers}}{\text{All contractors and subcontractors} + \text{All consultants} + \text{All appraisers}} = \text{Base figure}$$

The resulting calculation is as follows:

$$\text{Step One figure} = \frac{\text{Number of pre-qualified and certified DBE firms}}{\text{Number of all pre-qualified firms}}$$



## **VI. CERTIFICATION STANDARDS**

### **Burden of Proof**

Certification is required to participate in the DBE Program. The DBE certification process is separate and distinct from the prequalification process.

Firms applying for DBE Program certification have the burden of demonstrating to the Transportation Cabinet, by a preponderance of the evidence, that they meet the requirements of 49 CFR, Subpart D and Appendix E<sup>1</sup> concerning group membership or individual disadvantage, business size, ownership and control.

Firms owned and controlled by individuals identified in 49 CFR 26.67(a) as socially and economically disadvantaged are presumed to be eligible to participate in the Kentucky DBE Program. As a result, these individuals do not bear the burden of proving their eligibility. However, this eligibility presumption is rebuttable based upon the individual owner(s) ability to meet the personal net worth threshold of \$1.32 million.

Firms owned by individuals who are not presumed to be socially and economically disadvantaged, and firms owned by individuals for whom the presumption has been rebutted, have the burden of proving, by a preponderance of the evidence, that they meet the requirements of 49 CFR 26, Appendix E.

### **Group Membership Determinations**

Firms owned and controlled by individuals for whom a question arises concerning membership in a presumptively eligible group must prove, by a preponderance of the evidence, that said individuals are members of the group.

If the Cabinet has a reasonable basis for doubting the validity of the asserted group membership of an applicant, then it is appropriate for the OCRSBD to collect additional information. In such cases, the OCRSBD must inform the applicant, in writing, of the reasons for seeking additional documentary evidence.<sup>2</sup>

In making group membership determinations, the Cabinet shall consider whether the individual has held him/herself out to be a member of the group over a long period of time prior to applying for certification and whether the individual is regarded as a member of the group by the relevant community. The individual must submit appropriate documentation of group membership.

Firms applying for DBE Program certification whose claim to membership in a presumptively eligible group has been rejected by the Transportation Cabinet may demonstrate, on an individual basis, that they are socially and economically disadvantaged pursuant to 49 CFR 26, Appendix E.

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<sup>1</sup> 49 CFR 26.61.

<sup>2</sup> 68 Fed. Reg. 3550 (June 16, 2003).

Group membership determinations made by the Transportation Cabinet may be appealed under provisions of the Kentucky Revised Statutes (KRS) Chapter 13B. Decisions made under KRS 13B, if appealed, must be appealed to the USDOT.

## **Social and Economic Disadvantage Determinations**

Determinations of social and economic disadvantage are made by the Cabinet in accordance with 49 CFR 26.67.

### **1. Affidavit of Social and Economic Disadvantage**

All applicants for DBE certification shall submit a signed and notarized affidavit indicating that each presumptively eligible owner whose ownership contributes to the majority is, in fact, socially and economically disadvantaged. If the individual's personal net worth exceeds \$1.32 million, the individual's presumption of economic disadvantage is rebutted.

### **2. Personal Financial Statement**

Each program-eligible owner of a firm applying for DBE certification, along with his or her spouse whose ownership and control are relied upon to qualify for program participation, must submit a signed and notarized statement of personal net worth at the time the application for certification is made.

Personal net worth determinations made by the Cabinet shall exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence. A contingent liability does not reduce an individual's net worth. For example, an applicant cannot use the risk of a judgment in a pending lawsuit to reduce his or her personal net worth.

Individual applicants are required to submit their personal income tax information to the Cabinet so that an accurate determination of applicant eligibility for participation in the DBE Program can be made.<sup>3</sup>

The value of retirement accounts will be calculated in accordance with the standard set forth in 49 CFR 26.67.<sup>4</sup>

Statements of personal net worth must be submitted on the Small Business Association (SBA) personal net worth form in conjunction with the UCP Application.<sup>5</sup>

It is the policy of the Certification Committee to more closely scrutinize applicants who present a personal net worth of more than \$1 million, but less than \$1.32 million. Applicants showing a net worth in excess of \$1 million may be asked to provide an audited personal financial statement signed by a certified public

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<sup>3</sup> 68 Fed. Reg. 35548 (June 16, 2003).

<sup>4</sup> 49 CFR 26.67 and 68 Fed. Reg. 35548 (June 16, 2003).

<sup>5</sup> 49 CFR 26.67 and 68 Fed. Reg. 35547 (June 16, 2003).

accountant. OCRSBD will also retain the right to ask for additional or confirmatory financial information for any applicant for DBE certification.

### 3. Rebutting the Presumption of Social and Economic Disadvantage

If the Cabinet has a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and economically disadvantaged, it may initiate an inquiry to determine whether the presumption should be regarded as rebutted with respect to that individual. In such a proceeding, the Cabinet shall bear the burden of proving, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. The owners of the applicant firm shall produce all relevant information required to make a determination in the matter. Failure to do so may result in rejection of the application.

When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility unless and until he or she makes an individual showing of social and economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds the limit prescribed by USDOT, the individual is no longer eligible for participation in the DBE Program and cannot regain eligibility by making an individual showing of disadvantage.

If a firm applying for certification has a current, valid certification from, or is recognized by the Small Business Administration (SBA) under the 8(a) or Small and Disadvantaged Business (SDB) Program (except an SDB certification based on the firm's self-certification as an SDB), the Transportation Cabinet may accept the firm's 8(a) or SDB certification in lieu of conducting its own certification proceeding. The Transportation Cabinet may accept the certification of another USDOT recipient but is not required to do so. Out-of-state applicants must be certified in their home state.

### **Individual Determinations of Social and Economic Disadvantage**

Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification.

The Cabinet shall make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to the Cabinet, by a preponderance of the evidence, that the individual(s) who own and control it are socially and economically disadvantaged. An individual, whose personal net worth exceeds \$1.32 million, shall not be deemed to be economically disadvantaged. In making these determinations, the Cabinet shall use the guidance found in 49 CFR 26, Appendix E. The Cabinet shall require applicants for DBE certification who are not presumed eligible to provide sufficient information and documentation to the Cabinet to permit determinations under the guidance of Appendix E.

## **Business Size Determinations**

To be an eligible DBE, a firm (including its affiliates) shall be an existing small business, as defined by SBA standards. The Cabinet shall apply the current SBA business size standards found in 13 CFR 121 appropriate to the type(s) of work the firm seeks to perform in USDOT-assisted contracts.

Even if the firm meets the requirements of 49 CFR 26, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (13 CFR Part 121.402), over the firm's three (3) previous fiscal years, in excess of \$22.4 million. The USDOT adjusts this amount for inflation from time to time.

## **Ownership Determinations**

Determinations of ownership for purposes of DBE eligibility are made by the Transportation Cabinet in accordance with 49 CFR 26.69. All of the facts relative to ownership must be viewed as a whole.

To be an eligible DBE, a firm must be at least 51 percent (51%) owned by socially and economically disadvantaged individuals.

Corporations - socially and economically disadvantaged individuals must own at least 51 percent (51%) of each class of voting stock outstanding and 51 percent (51%) of the aggregate of all stock outstanding.

Partnerships - at least 51 percent (51%) of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

Limited liability firms - at least 51 percent (51%) of each class of member interest must be owned by socially and economically disadvantaged individuals.

### **1. Ownership**

The firm's ownership by socially and economically disadvantaged individuals must be real, substantial and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance not merely the form, of arrangements.

### **2. Contributions of Securities**

All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided below, no securities or assets held in trust or by any guardian for a minor, are considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held

in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if:

- (a) The beneficial owner of securities or assets held in trust is a disadvantaged individual and the trustee is the same or another such individual; or
- (b) The beneficial owner of securities or assets held in trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary and trustee.

### 3. Contributions of Capital

The contributions of capital by the socially and economically disadvantaged owners to acquire ownership interests must be real and substantial in accordance with 49 CFR 26.69(e).

Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in the firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

### 4. Contributions of Expertise

The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

The owner's expertise must be:

- (a) In a specialized field;
- (b) Of outstanding quality;
- (c) In areas critical to the firm's operations;
- (d) Indispensable to the firm's potential success;
- (e) Specific to the type of work the firm performs; and
- (f) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

The individual whose expertise is relied upon must have a significant financial investment in the firm.

5. Assets Gained Through Divorce, Inheritance or Death

The Cabinet will consider all interests in a business or other assets obtained by the individual resulting from a final property settlement or court order in a divorce or legal separation provided that no term or condition of the agreement or divorce decree is inconsistent with this section, or through inheritance, or otherwise because of the death of the former owner, as held by a socially and economically disadvantaged individual for purposes of determining ownership.

6. Gifts or Transfers

The Cabinet must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift or transfer without adequate consideration from any non-disadvantaged individual or non-DBE firm who is:

- (a) Involved in the same firm for which the individual is seeking certification or an affiliate of that firm;
- (b) Involved in the same or a similar line of business; or
- (c) Engaged in an on-going business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to the Cabinet, by clear and convincing evidence, that:

- (1) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (2) The disadvantaged individual actually controls the management and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

7. Marital Assets

The Cabinet shall apply the following rules in situations in which marital assets form a basis for ownership of a firm:

- (a) When marital assets (other than the assets of the business in question) held jointly or as community property by both spouses are used to acquire the ownership interest asserted by one spouse, the Cabinet must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is

domiciled. The Cabinet does not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm; and

- (b) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

#### 8. Situations Warranting Additional Investigation

The Cabinet may consider the following factors in determining the ownership of a firm. However, the Cabinet cannot find a firm ineligible solely because the capitalization for the firm was obtained in one of the following ways:

- (a) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift or transfer without adequate consideration other than as set forth in paragraph 6 above;
- (b) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards or other documents; or
- (c) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, the Transportation Cabinet must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

The DBE Program regulations do not prohibit the certification of a firm owned by spouses when an ineligible spouse, who retains ownership in the firm, is involved in the applicant business in any capacity. The regulations do, however, place a greater burden of proof, requiring the firm to show by "clear and convincing evidence" that any gift or transfer of assets to the eligible spouse without adequate consideration was made for reasons other than obtaining certification as a DBE and the disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of the non-disadvantaged individual who provided the gift or transfer.

#### **Control Determinations**

Determinations of whether a disadvantaged individual controls the firm are made in accordance with 49 CFR 26.71. In determining whether socially and economically disadvantaged owners control a firm, the Transportation Cabinet shall consider all the facts in the record, viewed as a whole.

## 1. Independence

Only an independent business can be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms. The Cabinet must consider several factors when determining whether the applicant DBE firm is independent including:

- relationships with non-DBE firms in such areas as facilities, equipment, financial and/or bonding support and other resources;
- whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm;
- the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm; and
- the consistency of relationships between the potential DBE and non-DBE firms with normal industry practice.

## 2. Restrictions on Control

The managerial role of the socially and economically disadvantaged owners in the firm's overall affairs must be such that it can reasonably be concluded that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management and policy.

A DBE firm must not be subject to any formal or informal restrictions that limit the customary discretion of the socially and economically disadvantaged owners to operate the firm. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in 49 CFR 26.69 (j)(2).

The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.



- (a) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president);
- (b) In a corporation, disadvantaged owners must control the board of directors; and
- (c) In a partnership, one or more disadvantaged owners must serve as general partners with control over all partnership decisions.

3. Involvement of Non-DBEs

Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm or be disproportionately responsible for the operation of the firm.

The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated.

In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

4. Knowledge of the Business

The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management and policy making. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

5. Business Licenses

If state law requires a person(s) to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged person(s) who own and control a potential DBE firm of that type must possess the required license or credential. If state law does not require such a person to have such a license or credential to own and/or control a firm, the Cabinet shall not deny certification solely on the ground that the person lacks the license or credential. The Cabinet, however, may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owner(s) actually control the firm.

6. Compensation of the DBE Owner

The Cabinet may consider differences in compensation between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. The Cabinet may determine that a firm is controlled by its socially and economically disadvantaged owner although that owner's remuneration is lower than that of some other participants in the firm.

In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, the Cabinet may consider a difference between the compensation of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

7. Outside Employment by the DBE Owner

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

8. Participation of Family Members

A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner or in another capacity. Except as otherwise provided, the Cabinet must make a judgment about the control the socially and economically

disadvantaged owner exercises vis-à-vis other persons involved in the business as is done in other situations, without regard to whether or not the other persons are immediate family members.

If the Cabinet cannot determine that the socially and economically disadvantaged owners as distinct from the family, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

Where a firm was formerly owned and controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual now owning the firm must demonstrate to the Cabinet, by clear and convincing evidence, that:

- (a) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (b) The disadvantaged individual actually controls the management, policy and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

9. Ownership of Equipment

In determining whether a firm is controlled by its socially and economically disadvantaged owners, the Cabinet may consider whether the firm owns equipment necessary to perform its work. However, the Cabinet must not determine that a firm is not controlled by socially and economically disadvantaged individual(s) solely because the firm leases, rather than owns, such equipment where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

10. Certification for Specific Types of Work

The Cabinet shall grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm must demonstrate to the Transportation Cabinet only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. The Transportation Cabinet may not, in this situation, require that the firm be re-certified or submit a new application for certification, but must verify the disadvantaged owner's control of the firm in the additional type of work.

11. Franchise Firms

A business operating under a franchise or license agreement may be certified if it meets the standards in 49 CFR 26 and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, the Cabinet shall generally not consider the restraints relating to standardized quality, advertising, accounting format and other provisions imposed on the franchisee agreement or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on the sale or transfer of the franchise interest or license.

12. Use of Leased Employees

The socially and economically disadvantaged individual(s) controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individual(s) from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

**Prequalification - Certificates of Eligibility to Contract**

All contractors who propose to do work with the Cabinet must obtain a Certificate of Eligibility to contract<sup>6</sup> or obtain a waiver of the requirement from the Cabinet. This requirement also applies to DBEs seeking to contract with the Cabinet, or seeking to act as subcontractors on Cabinet projects. This process is called “prequalification” and is separate and distinct from the DBE certification process.

Construction contractors must be prequalified by the Division of Construction Procurement. An application for a Certificate of Eligibility must be obtained from the Division of Construction Procurement. Engineering, design, surveying and other professional services firms must be prequalified through the Division of Professional Services. The Certificate of Eligibility is obtained independently of the DBE certification. A potential DBE may apply for a Certificate of Eligibility prior to completing the DBE certification process.

Contractors who engage in professional engineering must meet the requirements of 600 KAR 6:040. Firms that do not engage in professional engineering, but wish to provide other services to the Cabinet must meet the requirements of 603 KAR 2:015.

All applicants for Certificates of Eligibility are required to prove that they are financially solvent and that they have access to the equipment and expertise necessary to perform the work. The applicant’s experience record shall be verified and performance reports of active

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<sup>6</sup> Kentucky Revised Statutes 176.130.

contractors will be reviewed. The Prequalification Section shall determine the maximum financial capacity of the applicant, as provided in the regulations.

Certificates of Eligibility must be renewed within one-hundred twenty (120) days after the end of the applicant's fiscal year. The applicant must file its application for continuation within 90 days of the end of its fiscal year. The Cabinet has thirty (30) days to process the application.<sup>7</sup>

### **Management Development Course**

Firms prequalified by the Cabinet under KRS 45A.825, 600 KAR Chapter 6, or 603 KAR 2:015 to engage in highway construction, design or right-of-way activities shall attend at least one (1), one-week management development course every three (3) years. Certified DBE firms not based in Kentucky may be required by the Cabinet to attend at least one (1) management development course.

Certified DBE firms, which have previously attended a management development course and which have been cited for a violation of the governing federal regulation or Kentucky Administrative Regulations, may be required to attend an additional management development course.

All owners of firms required to attend a management development course shall attend the course. The owners of certified DBE firms that are not required to attend the management development course, may apply to attend. The Cabinet shall accommodate them on a space available basis.

### **Other Rules Affecting Certification**

The Cabinet must consider other factors when making a determination of whether an applicant is DBE eligible. These factors are found at 49 CFR 26.73 and include:

- Whether a DBE applicant can perform a "commercially useful function" as a DBE contractor cannot be considered during the certification process except as set forth below.<sup>8</sup>
- The Cabinet shall consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE Program. For example, the Cabinet may consider whether the DBE is performing a "commercially useful function" when there is a suspicion that the firm is acting as a pass through of funds and is not performing work on contracts it receives for DBE credit.<sup>9</sup>

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<sup>7</sup> 603 KAR 2:015(6).

<sup>8</sup> 49 CFR 26.73(a)(1).

<sup>9</sup> 49 CFR 26.73(a)(2).

- Only firms organized for profit may be eligible DBEs. Non-profit entities, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.<sup>10</sup>
- DBE firms must be owned by individuals who are socially and economically disadvantaged. Except as set forth in 49 CFR 26.73 (e), a firm that is not owned by such individuals, but instead is owned by another firm, even a DBE firm, cannot be an eligible DBE.<sup>11</sup>

The Cabinet shall evaluate the eligibility of a firm on the basis of present circumstances. The Cabinet shall not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of 49 CFR 26. The Cabinet cannot refuse to certify a firm solely on the basis that it is a newly formed firm.

DBE firms and firms seeking DBE certification must cooperate fully with the Cabinet's and USDOT's requests for information relevant to the certification process. Failure or refusal to provide such information is a ground for denial or removal of certification.

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<sup>10</sup> 49 CFR 26.73(d).

<sup>11</sup> 49 CFR 26.73(e).

## **VII. CERTIFICATION PROCEDURES**

### **Application Process**

The Cabinet's DBE certification process is conducted in accordance with the Kentucky Unified Certification Program (UCP) Agreement<sup>12</sup> as approved by FHWA. The UCP provides that the Cabinet is the primary certification authority for the USDOT DBE Program in Kentucky. A copy of the UCP Agreement is located in the Appendices.

The Cabinet shall determine the eligibility of firms applying for DBE certification within 90 days receipt of a signed, notarized and completed UCP Certification Application<sup>13</sup> *and Personal Net Worth Statement (PNW)* (49 CFR 26.83(k)). All firms seeking DBE certification shall submit an application for certification or continuation to the Cabinet's OCRSBD.

- Each application form shall be completed in full with all required documentation attached. If the application is incomplete, the OCRSBD will contact the applicant to request missing information or additional information. Incomplete applications will not be processed.
- The Cabinet may request additional information in order to determine if an applicant firm should be certified. Failure of the applicant firm to provide the requested information shall be cause for the Cabinet to deny the application.
- The person signing the application shall identify his or her position with the firm or business enterprise applying for certification.

An out-of-state applicant must be certified as a DBE by the state transportation agency responsible for certifying firms under 49 CFR 26 in the state in which the firm has residence. An applicant's "home state" is the state in which it maintains its principal place of business. The Cabinet is not required to process an application for certification from a firm having its principal place of business outside Kentucky if the firm is not certified by the UCP in the state in which it maintains its principal place of business.

The DBE Certification Committee may accept the out-of-state certified DBEs except in cases in which the Cabinet has information indicating that the DBE may be acting in violation of the requirements of 49 CFR 26.

### **On-site Inspection and Owner Interview**

(49 CFR 26.83)

On-site inspections will be attended by at least two OCRSBD investigators. The inspection shall include a review of the applicant's file (application and attachments), notes, photos and other documentation gathered during the on-site inspection. This information shall be compiled and summarized for the use and review of the DBE Certification Committee.

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<sup>12</sup> 49 CFR 26.81

<sup>13</sup> The UCP Application is available through the OCRSBD.

The Transportation Cabinet:

- Shall perform an on-site inspection of each new applicant located within the boundaries of Kentucky.
- Will perform an on-site inspection of any certified firm actively working on Cabinet projects that is applying for continuation of its DBE status.
- May also perform periodic on-site inspections through its on-going monitoring of certified DBE firms doing work with the Cabinet or upon receipt of a third party complaint concerning the eligibility of any firm certified by the Cabinet.

Failure of the applicant firm to participate in the on-site inspection shall be sufficient cause for the Cabinet to deny the application.

OCRSBD will rely on reports of findings from on-site visits from all out-of-state DBEs seeking certification by the Cabinet. However, in the event that the Cabinet has information indicating that the DBE may be acting in violation of the requirements of 49 CFR 26, the Cabinet may initiate additional investigations.

### **Resources Available to DBE Applicants**

During the period prior to the formal submittal of the application, the OCRSBD shall:

- (a) When requested by the applicant, provide technical advice needed by the applicant in completing the application form and the supporting documentation; and
- (b) When requested by the applicant, advise the applicant firm of any apparent existing structural, organizational or financial impediments to the firm's certification.

### **Evaluation of Application**

The Cabinet shall use the eligibility standards set forth in 49 CFR Part 26 to determine the eligibility of a firm to be certified or renewed as a DBE.

### **Notice of Certification**

An applicant for DBE certification shall be notified in writing of the DBE's determination of eligibility within ten (10) business days of the DBE Certification Committee meeting at which the determination is made.



## **Duration of Certification**

In accordance with 49 CFR 26.83(h), once a DBE is certified, it shall remain certified unless and until its certification has been removed through the procedures found in 49 CFR 26.87. A review of the certified firm will be performed every three (3) years of certification, beginning from the date of the initial notice of certification. It is the policy of the Federal Highway Administration that DBE certification does not expire. Certification must be affirmatively revoked using the prescribed procedures.

If, within thirty (30) days of a change in ownership or control, the firm notifies the Cabinet of the change, the Cabinet may extend the continuation date of the DBE firm for a brief period of time and with reasonable conditions placed on the firm. The Cabinet must then review the firm's eligibility status based upon a review of the firm's current circumstances.

Certified DBEs must provide current information concerning matters that may or would impact their eligibility as well as current contact information. Failure to provide current information impacting eligibility (including ownership, personal net worth and gross receipts) may result in decertification.

## **Continuation**

Per 49 CFR 26.83(j), DBEs must provide an affidavit attesting to the firm's circumstances affecting its ability to meet the set requirements on the anniversary date of certification; therefore, the Cabinet will notify each DBE forty-five (45) days prior to the anniversary date of the firm's certification, of the requirement to submit an affidavit if the firm intends to continue its certification. The affidavit shall attest to the following:

- That there have been no changes made in the organization, structure, ownership and control of the firm since the last application was filed; and
- That the application form and attachments would be identical to the last one filed.

The affidavit shall be submitted to the Cabinet on the No Change Affidavit<sup>14</sup>, and include documentation of the (SBA business) firm's size and gross receipts for the most recent three (3) years. If the affidavit is not received by the continuation date, the Cabinet shall initiate the process to remove the DBE's eligibility. Removal proceedings shall be initiated by a written notice to the DBE pursuant to 49 CFR 26.87.

## **Denials of Eligibility**

If an application for certification as a DBE is denied by the DBE Certification Committee, the Cabinet shall issue a formal notice of denial setting forth the reasons for denial. A denial may be appealed to the Cabinet in accordance with KRS 13B within thirty (30) days of the

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<sup>14</sup> A copy of the No Change Affidavit is located in Appendices.

receipt of the notice. The applicant may also appeal the decertification decision directly to the United States Department of Transportation.

An applicant firm shall not reapply for certification for one (1) year from the effective date of denial. The effective date of denial shall be the date the notice is received or delivery is attempted.

Upon a showing of good cause, the Cabinet may permit exceptions to this policy. The Cabinet reserves the right to permit an applicant firm to reapply for certification prior to the one (1) year from the effective date of denial, but not less than three (3) months from the effective date of denial.

## **Removal**

The Cabinet may perform periodic reviews or on-site inspections of a certified DBE firm during its certification period to verify the continued eligibility of the firm. This process may include sending certified letters to a DBE firm's address on file with the Cabinet in an attempt to verify information. If the Cabinet finds noncompliance with the eligibility criteria, the certified firm fails to provide reasonable information requested or the firm fails to maintain current information with the Transportation Cabinet, the Cabinet shall initiate proceedings consistent with 49 CFR 26.87 to remove the firm.

At the time of the preliminary determination that removal proceedings may be appropriate, and at least forty-five (45) days prior to submittal of the information supporting decertification to the Committee, OCRSBD shall issue a notice to the DBE of the intent to remove the firm. The notice shall outline the evidence supporting removal and ask for information to support the firm's continued eligibility. The DBE firm also shall have thirty (30) days from the receipt of the notice to supply the information to OCRSBD for the Committee's review. The firm will be afforded the opportunity for an informal hearing before the DBE Certification Committee, at which time the firm may respond to the Cabinet's reasons for the proposal to remove its eligibility.

The effective date of removal shall be thirty (30) days after the date the notice of removal is mailed to the firm, provided the firm does not appeal the removal to the Cabinet. If a firm formally appeals the removal, the effective date shall be the date of the final ruling of the Secretary of the Transportation Cabinet. Removal shall be for a specific period of time but not less than one (1) year.

Decisions of the DBE Certification Committee may be appealed under the provisions of KRS 13B. Administrative determinations made in accordance with the procedures set forth in KRS 13B may be appealed to the USDOT. The firm may continue to work as a DBE until all appeals are exhausted.

## **Challenges to DBE Eligibility**

A third party may challenge the socially and economically disadvantaged status of an applicant for DBE status or of a certified DBE. The challenge shall be made in writing to the Transportation Cabinet.

With its letter, the challenging third party shall include all information available to it, which is relevant to a determination of whether the challenged party is in fact socially and economically disadvantaged.

The Cabinet shall determine, on the basis of the information provided by the challenging party and through its own review of the applicant or DBE's eligibility, if there is reason to believe that the challenged party is in fact not socially and economically disadvantaged.

The Cabinet shall notify the challenging party in writing of its determination concerning the eligibility of the challenged party. This shall terminate the proceeding.

If the Cabinet determines that there is reason to believe that the challenged party is not socially and economically disadvantaged, the OCRSBD shall notify the challenged party that his or her status as a socially and economically disadvantaged individual has been challenged.

The notice shall:

- (a) Identify the challenging party;
- (b) Summarize the grounds for the challenge; and
- (c) Require the challenged party to provide the Cabinet, within a specific reasonable time period, information sufficient to evaluate his or her status as a socially and economically disadvantaged individual.

Failure to provide the requested information within the time limit specified shall be cause for the DBE to be decertified or denied certification. If the socially and economically disadvantaged status of a new applicant is challenged, the challenge proceedings shall be completed prior to completion of the certification.

The Cabinet shall evaluate the information available and make a proposed determination as to the social and economic disadvantage of the challenged party. The Cabinet shall notify both parties of this proposed determination, setting forth the basis for its determination.

The presumption that the challenged party is a socially and economically disadvantaged individual shall remain in effect until the determination has been made. The decision of the Cabinet may be appealed to the USDOT by the adversely affected party under the procedures of 49 CFR 26.89.

## **Appeals and Hearings**

Any party adversely affected by a decision of the Cabinet may appeal that decision within thirty (30) days of the notice of determination. The appeal shall be filed in writing with the Cabinet. The Cabinet shall schedule a date for a hearing on the appeal as soon as reasonably possible.

If an appeal hearing is rescheduled beyond the thirty (30) days from the date of the notification to deny certification at the request of the applicant firm and the firm is not currently certified, the firm's annual certification has expired or the firm's request for continuation has been denied, the Cabinet shall not approve as part of an established DBE goal any of the work contracted by the applicant. The Cabinet shall conduct the administrative hearing pursuant to KRS Chapter 13B.

The hearing examiner's recommended findings of fact shall be sent to the Secretary of the Transportation Cabinet and shall be based on conditions existing at the time of the on-site inspection and owner interview conducted by the Cabinet. Changes made in the applicant's firm since the on-site inspection and owner interview shall not be considered by the Cabinet or a hearing examiner in determining the eligibility of the firm. An appeal from the Cabinet's final decision may be made to the USDOT in accordance with 49 CFR 26.89.

All certification denial notices (Notices of Final Action) issued by the Cabinet shall contain a statement advising the applicant of his or her right to appeal the determination to the Transportation Cabinet and to the USDOT pursuant to 49 CFR 26.89.

Appeals made to the Transportation Cabinet shall be made within thirty (30) days of the adverse determination and shall be sent to the following address:

Kentucky Transportation Cabinet  
Office for Civil Rights and Small Business Development  
200 Mero Street, Sixth Floor  
Frankfort, KY 40622

Appeals made to USDOT shall be filed within ninety (90) days of receipt of the adverse determination and must be sent to the following address:

US Department of Transportation  
Office of Civil Rights  
1200 New Jersey Ave., S.E., Room 5414  
Washington, DC 20590

The Cabinet shall provide to the USDOT a complete record of all administrative proceedings held on the matter including all supporting and requested documents, files and application forms, within twenty (20) days receipt of a notification by the USDOT that an appeal has been filed with USDOT in the matter.

The Cabinet shall promptly implement any USDOT certification appeal decisions affecting the eligibility of a firm adversely affected by the Cabinet's decision to deny its DBE certification.

## **VIII. DBE CERTIFICATION COMMITTEE**

The certification entity for the Kentucky Transportation Cabinet is the DBE Certification Committee. The DBE Certification Committee operates in accordance with the UCP Agreement and shall make certification eligibility determinations consistent with 49 CFR 26.

The DBE Certification Committee is comprised of the following members:

- (a) Executive Director, Office for Civil Rights & Small Business Development or his/her designee, Chair, nonvoting member;
- (b) Deputy Secretary of the Transportation Cabinet or his/her designee;
- (c) Director, Division of Construction or his/her designee;
- (d) Director, Division of Highway Design or his/her designee;
- (e) Audit Manager, Internal Audit Branch or his/her designee;
- (f) Director, Division of Construction Procurement or his/her designee;
- (g) Director, Division of Professional Services or his/her designee;
- (h) Executive Director, Office of Legal Services or his/her designee, nonvoting member; and the
- (i) Kentucky Administrator of the Federal Highway Administration or his/her designee, ex officio, nonvoting member.

The Chair of the DBE Certification Committee shall schedule meetings as needed.

## **IX. SMALL BUSINESS PARTICIPATION**

Recognizing that the DBE Program goals should be met through a mixture of race conscious and race neutral methods and that by definition, DBE firms are small businesses, the Transportation Cabinet seeks to implement a small business element into its current DBE Program Plan in accordance with applicable law.<sup>15</sup> The Cabinet is including this element to facilitate competition by, and expand opportunities for, small businesses. The Cabinet is committed to taking all reasonable steps to eliminate obstacles to small businesses that may preclude their participation in procurements as prime contractors or subcontractors. The Cabinet will meet its objectives using the following methods and strategies:

### **Small Business Goal and Outreach**

1. Small Business Goal: The Cabinet will set a goal on all FHWA-assisted transportation projects of two million dollars (\$2,000,000) or more for participation by small businesses. All small businesses, who otherwise meet the requirements set out herein, may compete for these prime contract and subcontract awards, regardless of the owner's gender, race or geographic location. This small business goal is in addition to the DBE contract goals, which may be required pursuant to applicable law or policy. If a small business goal is not set on a FHWA-assisted contract of two million dollars (\$2,000,000) or more, the goal setting committee<sup>16</sup> will document why a small business goal is inappropriate and the factors which were considered in making that determination, including project scope and estimated availability of firms.

How Goal Will be Determined: Basic procedures for setting the small business goals on Cabinet projects will be as follows: the goal setting committee, which consists of three (3) members, one (1) member from each, Construction Procurement, Permits Branch and the Office for Civil Rights, will set the small business goals. Construction Procurement will provide a copy of the field estimate to each member prior to the goal setting committee meeting. Each member will review the project line item by line item and determine which tasks small businesses can perform. Each member will look at it with their own unique expertise and resources and make their individual recommendations.

During each meeting, members bring their recommendations and prepare to explain the rationale for each. Members then proceed to discuss each project and what items are to be included to make up the goal recommendation. If the members' numbers differ greatly, each member then explains why he/she included or excluded certain items as being something that a small business could perform. This time is used to determine if there are any special circumstances or additional information needed, which may have impacted recommendations.

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<sup>15</sup> 49 CFR 26.39

<sup>16</sup> The goal setting committee for the DBE Program will also be responsible for setting the Small Business goal on FHWA-assisted contracts.

The goal setting committee attempts to reach a consensus with the understanding that it must set attainable goals, with full consideration of safety, quality and ethics, that will meet the overall goal of x%. The committee finalizes the goal and all members agree. Construction Procurement captures all goals in writing and forwards them for final approval to the State Highway Engineer. Construction Procurement keeps the final data. Because the information is sensitive, individual members shred their copy of the field estimate.

2. Outreach: The Cabinet will seek to develop and implement outreach training opportunities for small businesses through current Cabinet services. Each year, the Cabinet holds public forums across the state. These forums provide an opportunity to introduce the Small Business program to the the public and affords the opportunity to discuss the DBE program, its goals and the goal setting process with the public and current DBEs. In addition, forums are used to explain the certification program, the application process and to encourage and assist any interested small business owners to make application.

## **Unbundling**

The Cabinet considered unbundling as a feasible strategy and/or method as part of its Small Business element of its Program Plan. However, based on the structure and administrative processes associated with the Cabinet's bidding and letting of contracts, it was determined that unbundling would not be a feasible method to facilitate participation for small businesses as prime contractors and subcontractors.

## **Certification Standards**

1. A business or firm seeking to be certified as a Small Business Enterprise (SBE) for purposes of participating in the Small Business element of the Cabinet's DBE Program Plan must have a personal net worth of less than \$1.32 million.<sup>17</sup>
2. A business or firm must meet the definitions specified in Section 3 of the Small Business Act and the Small Business Administration regulations implementing it (13 CFR Part 121). A small business is a business that is independently owned and operated, organized for profit and not dominant in its field. Depending on the industry, size standard eligibility is based on the average number of employees for the preceding twelve (12) months or on sales volume averaged over a three-year period.

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<sup>17</sup> See 49 CFR 26.



## **Certification Procedures**

1. A business or firm seeking to be certified as a SBE must complete and submit an application and affidavit with the requested documentation to the Cabinet's Office for Civil Rights and Small Business Development (OCRSBD). An incomplete application will not be processed.
2. Review of a signed, notarized and complete application will be a desk audit performed by the Cabinet's DBE Liaison Officer and/or his/her designee, with required documentation to include but not limited to, a list of equipment, long term leases, rental agreements, personal and business taxes, a balance sheet and Secretary of State registration.
3. The Cabinet's DBE Liaison Officer and/or his/her designee will have sixty (60) days to process the completed application and issue a determination.
4. Upon certification, the SBE will be certified for a period of three (3) years. At the expiration of this certification period, the SBE will be required to submit an updated application for continued eligibility.
5. Once certified, all SBEs must submit a "No Change Affidavit" and "Personal Net Worth Statement" annually to reconfirm their firm's eligibility status.
6. Certified SBEs must provide current information concerning matters that may impact their eligibility, as well as, current contact information. Failure to provide current information impacting eligibility (including personal net worth and gross receipts) may result in decertification.
7. If an application for certification as a SBE is denied by the Cabinet's DBE Liaison Officer and/or his or her designee, the Cabinet shall issue a formal notice of denial setting forth the reasons for denial. A request for reconsideration may be made to the OCRSBD Director within ten (10) days of the date of the formal notice of denial. In consultation with the Cabinet's Director of the Office of Legal Services (OLS), the OCRSBD Director will review the record and any additional information the aggrieved party wishes to submit along with a position statement as to why it is believed the determination of non-eligibility was in error. The OCRSBD Director and OLS Director may also consult with FHWA as part of the review of the request for reconsideration. The OCRSBD Director shall have thirty (30) days to issue a final determination.

## **Reciprocal Certification**

The Cabinet will accept the following certifications without the necessity of application for participation in the Small Business element of the Cabinet's DBE Program with applicable stipulations:

1. KYTC DBE Certification – DBE Certification by KYTC which stipulates that a firm has been determined to meet all the requirements in accordance with 49 CFR Part 26. All certification determinations are evidenced by a letter of DBE certification issued by KYTC.
2. SBA 8(a) Business Development Certification (as described in 13 CFR Parts 121 and 124) – will require submittal of three (3) years of business tax returns.

### **Decertification**

The Cabinet shall perform periodic reviews of a certified SBE firm during its certification period to verify the continued eligibility of the firm. This process may include sending certified letters to a SBE firm's address on file with the Cabinet in an attempt to verify information. If the Cabinet finds noncompliance with the eligibility criteria, the certified firm fails to provide reasonable information requested or the firm fails to maintain current information with the Cabinet, the Cabinet shall decertify the firm.

At the time of the preliminary determination that decertification may be appropriate, OCRSBD shall issue a notice to the SBE of the intent to decertify the firm. The notice shall outline the evidence supporting decertification and ask for information to support the firm's continued eligibility. The SBE firm shall have thirty (30) days from the receipt of the notice to supply the information to OCRSBD for review.

The effective date of decertification shall be thirty (30) days after the date the notice of decertification is mailed to the firm provided the firm does not appeal the decertification to the Cabinet. If a firm appeals decertification, the effective date shall be the date of the final ruling of the Director of OCRSBD. Decertification shall be for a specific period of time but not less than one (1) year.

### **Implementation Schedule**

The Cabinet will implement its Small Business element of its DBE Program within six (6) months of Federal Highway Administration Association's (FHWA) approval of this program.

## **X. CONTRACT ADMINISTRATION**

### **Recipient/Contractor Assurances**

Each Federal-aid construction or design contract approved by the Cabinet shall include the following assurance:

“The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.”

### **Contract Award Process**

The Cabinet reviews each federally-funded highway contract to determine if it is appropriate to set a DBE goal. If a DBE goal is set on a highway contract, the project goal will be provided in the *Notice to Contractors* issued at least twenty-one (21) days prior to the project letting and in the project proposal.

Contractors shall exercise all necessary and reasonable efforts to ensure that DBEs participate in at least the percent of the total dollar amount of the project goal designated in the contract. For example, if the project cost is \$10 million and carries a six percent (6%) goal, \$600,000 of the contract shall be allocated to certified DBEs, or the contractor must show that all reasonable efforts were exerted to meet the goal. (See Good Faith Efforts.)

#### **1. Certification of Contract Goal**

Contractors shall certify their anticipated DBE participation in their bids on projects for which a DBE goal has been established as follows:

“The bidder certifies that it has secured participation by Disadvantaged Business Enterprises (“DBE”) in the amount of (x) percent of the total value of this contract, and that the DBE participation is in compliance with the requirements of 49 CFR Part 26 and the policies of the Kentucky Transportation Cabinet pertaining to the DBE Program.”

**BIDS SUBMITTED WHICH DO NOT INCLUDE CERTIFICATION OF DBE PARTICIPATION WILL NOT BE READ PUBLICLY. These bids will not be considered for award by the Transportation Cabinet and will be returned to the bidder.**

#### **2. Tips for Contractors**

The Cabinet has, and will, continue to reject entire bid packages for failure to comply with the policies contained in this section.

- If there is a goal on the project, bidders may not leave the certification blank. Bids that do not include a percentage in the certification will be rejected as non-responsive.
- Bidders may designate zero (0) in the certification and still have their bids considered for award. However, bidders who certify zero (0) as their goal must prove through the Good Faith Efforts process that they have made reasonable efforts to meet the DBE project goal.
- Any bid that includes a DBE participation percentage of less than the project goal set by the Cabinet will be required to submit a "Good Faith Efforts" Package for review by the Cabinet's Good Faith Efforts Committee.

### 3. After the Letting

After the letting, the Cabinet will review each proposal containing a DBE goal and determine if a General DBE Participation Plan has been submitted. Plans submitted with low bids will be reviewed to ensure that the DBEs listed are DBE certified and that they hold certificates of eligibility to perform the work that is to be contracted to them. Discrepancies in these areas may cause the bid to be rejected and the second responsive bid will then be reviewed for compliance.

The Cabinet schedules project lettings as needed. Following the letting, the low bid on each project is submitted to the Awards Committee at the earliest possible date to be considered for award. If the low bidder has met the DBE goal and has included its General DBE Participation Plan in its bid package, then the Awards Committee may consider the bid as soon as the Division of Construction Procurement can approve the General DBE Participation Plan.

The low bidder who does not submit a General DBE Participation Plan with the bid must submit it within ten (10) calendar days of receipt of notification that it is the low bidder. The project will not be considered for award prior to submission and approval of the low bidder's General DBE Participation Plan.

If the Cabinet determines that the low bidder has not complied with the DBE Program goal and policies, the Cabinet may award the project to the next lowest responsive bidder, or re-bid it.

### **Proving Good Faith Efforts**

Once a DBE goal is established on a contract, the Cabinet may only award the contract to a prime contractor who has made a good faith effort to meet the DBE goal. The contract shall not be awarded unless the low bidder can show prior to the award that it has either met the contract goal or it expended sufficient good faith efforts to meet the goal and despite those efforts, failed. The Cabinet shall not withhold an award of a contract if the low bidder has made a good faith effort to meet a project goal but has failed despite those efforts.

1. Defining Good Faith<sup>18</sup>

“Good faith” is obtained if<sup>19</sup>:

- The prime contractor provides documents to show that the goal is met; or
- The prime contractor documents that it made adequate good faith efforts to meet the goal, even though it did not succeed.

If a bidder fails to meet the goal established on a contract, then it may still be awarded the contract if it can be shown that it made all necessary and reasonable steps to secure the required DBE participation. The bidder must provide the Cabinet with sufficient documentation to meet this test. The bidder must provide the Good Faith Efforts Committee with a Good Faith Efforts Package. The Good Faith Efforts Package shall include, but need not be limited to, information showing evidence of the following<sup>20</sup>:

- Whether the bidder attended any pre-bid meetings that were scheduled by the Cabinet to inform DBEs of subcontracting opportunities;
- Whether the bidder provided solicitations through reasonable and available means;
- Whether the bidder provided written notice to all DBEs listed in the DBE directory who are prequalified in the areas of work that the bidder will be contracting;
- Whether the bidder followed up initial solicitations of interest by contacting DBEs to determine with certainty whether they were interested. If a reasonable amount of DBEs within the targeted districts do not provide an intent to quote, or no DBEs are prequalified in the subcontracted areas, the bidder must notify the DBELO in the OCRSBD to give notification of the bidder’s inability to get DBE quotes;
- Whether the bidder selected portions of the work to be performed by DBEs in order to increase the likelihood of meeting the contract goals. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise perform these work items with its own forces;
- Whether the bidder provided interested DBEs with adequate and timely information about the plans, specifications and requirements of the contract;
- Whether the bidder negotiated in good faith with interested DBEs not rejecting them as unqualified without sound reasons based on a thorough investigation of

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<sup>18</sup> 49 CFR 26.53.

<sup>19</sup> 49 CFR 26.53(a).

<sup>20</sup> Further guidance may be found in 49 CFR Part 26, Appendix A.

their capabilities. Any rejection should be so noted in writing with a description as to why an agreement could not be reached;

- Whether quotes were received from interested DBEs but were rejected as unacceptable without sound reasons why they quotations were considered unacceptable. The fact that the DBE's quote for the work is not the lowest quote received, will not in itself be considered as a sound reason for rejecting the quote as unacceptable. The fact that the bidder has the ability and/or desire to perform the contract work with its own forces will not be considered a sound reason for rejecting a DBE quote. Nothing in this provision shall be construed to require the bidder to accept unreasonable quotes in order to satisfy DBE goals;
- Whether the bidder specifically negotiated with subcontractors to assume part of the responsibility to meet the contract DBE goal when the work to be subcontracted includes potential DBE participation;
- Whether the bidder made any efforts and/or offered assistance to interested DBEs in obtaining the necessary equipment, supplies, materials, insurance and/or bonding to satisfy the work requirements of the bid proposal; and
- Any other evidence that the bidder submits which may show that the bidder has made reasonable good faith efforts to include DBE participation.

## 2. Good Faith Efforts Packages

If the DBE participation submitted in the bid by the lowest responsive bidder does not meet or exceed the DBE contract goal, the lowest responsive bidder must submit a Good Faith Efforts Package to satisfy the Transportation Cabinet that sufficient good faith efforts were made to meet the contract goals prior to submission of the bid.

Efforts to increase the goal after bid submission will not be considered in justifying the good faith effort, unless the prime contractor/consultant can show that the proposed DBE was solicited prior to the letting date. DBEs utilized in achieving the DBE goal must be certified and prequalified at the time the bid is submitted.

One (1) complete set and nine (9) copies of this information must be received in the Division of Construction Procurement no later than 12:00 noon of the tenth calendar day following opening of bids.

Where the information submitted includes repetitious solicitation letters, it is acceptable to submit a sample representative letter along with a distribution list of the firms solicited. Documentation of DBE quotations shall be a part of the good faith effort submittal as necessary to demonstrate compliance with the factors listed below, which the Cabinet considers in judging good faith efforts. This documentation may include written subcontractors' quotes, telephone log notations of verbal quotes, or other types of quote documentation.

The Good Faith Efforts Package shall include, but may not be limited to, information showing evidence of a bidder's efforts to meet the goal.

3. Failure to Meet Good Faith Effort Requirement

Where the low bidder fails to submit sufficient DBE participation to meet the contract goal and the Good Faith Efforts Committee determines that the low bidder failed to make sufficient efforts to meet the contract goal, the bidder will be notified that it has not made a good faith effort. The bidder will be offered the opportunity to meet in person for administrative reconsideration. The Good Faith Efforts Committee shall make its determination based upon the record as a whole.

The bidder will be notified of the Good Faith Efforts Committee's decision within 24 hours of its decision. The notification will be confirmed in writing. The bidder will have 24 hours to request reconsideration of the Good Faith Efforts Committee's decision. The reconsideration meeting will be held within two (2) working days of the receipt of a request from the bidder for reconsideration.

The Cabinet reserves the right to award the contract to the next lowest responsive bidder or to rebid the contract in the event that the contract is not awarded to the low bidder as the result of a failure to meet the good faith requirement.

Refer to the Administrative Reconsideration Section for additional information.

4. Good Faith Efforts After the Contract Award

In instances where a DBE subcontractor cannot or will not perform work as contracted, the prime contractor may be required to replace the DBE subcontractor on the job, or prove good faith efforts to do so.

## **Good Faith Efforts Committee**

The Division of Construction Procurement has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by contractors seeking to act as prime contractors on Cabinet projects that receive federal highway funds. The recommendations of the Division of Construction Procurement concerning good faith efforts are submitted to the Good Faith Efforts Committee for consideration and final approval.

1. Good Faith Efforts Committee Membership

The following entities shall be represented on the Committee:

Chair:  
Office of the State Highway Engineer

Members:  
Cabinet Secretary, or his designee

Office of Civil Rights & Small Business Development  
Division of Construction  
Division of Construction Procurement  
Internal/External Audits Branch

Secretary:  
Division of Construction Procurement

Advisor:  
Office of Legal Services

Resource:  
DBE Liaison Officer

Ex Officio Invitees:  
Federal Highway Administration  
Kentucky Association of Highway Contractors

## 2. Rules of Operation

Committee members must attend all meetings of the Good Faith Efforts Committee or be represented by a proxy. The proxy shall be named in advance and designated by the director of the subject entity in writing and shall attend Committee meetings on all occasions when the member is unavailable. The intent of this provision is that the Good Faith Efforts Committee be comprised of persons familiar with the purpose, goals and operations of the DBE Program.

All members must receive notice of the meeting not less than five (5) working days prior to the meetings. When possible, the notice will include all Good Faith Efforts Packages submitted to the Cabinet by prospective bidders. In the event that the State Highway Engineer cannot attend, then the Deputy State Highway Engineer for Project Delivery or his proxy will attend and act as Chair.

The Good Faith Efforts Committee meetings are held on the Monday after the Good Faith Efforts Packages are due to the Cabinet. If the Monday is a holiday, the Committee meeting will be held on the Tuesday following the date that the Good Faith Efforts Packages are due or on a date designated by the State Highway Engineer.

## 3. Good Faith Efforts Committee Procedures

The Good Faith Efforts Committee meeting is for the purpose of allowing the members to analyze the Good Faith Efforts Packages and to ask questions of the Division of Construction Procurement staff concerning the bidder's efforts. The Chair will then call for a vote and only designated voting members along with the Secretary and advisor will remain while the committee votes to make the determination of good faith.



A representative of the Division of Construction Procurement acts as Secretary to the Good Faith Efforts Committee. Official minutes are recorded and must be typed, approved and signed by the representative as Secretary and by the State Highway Engineer as Chair. Votes are then recorded; the validity of the good faith effort will be determined by a simple majority vote after the Committee members have had an opportunity to review and consider the Good Faith Efforts Package as a whole. In the event of a tie, the Chair shall then cast the tie-breaking vote.

If the vote of the Committee is not unanimous, individual votes shall be recorded. The original minutes are retained in the Good Faith Efforts Committee's files in the Division of Construction Procurement. Each Committee member receives a copy of the minutes.

The contractor requesting approval of good faith efforts may attend the Good Faith Efforts Committee meeting, but must leave with all non-voting members when the committee votes.

In the event that the Committee determines, by a preponderance of the evidence, that the lowest responsive bidder has failed to meet the Good Faith Efforts criteria, then that bidder will be rejected and the Good Faith Efforts Package of the next lowest responsive bidder may be requested (if that bidder did not meet the goal) and reviewed in the same manner or the Cabinet, at its discretion, may elect to rebid the project.

#### 4. Good Faith Efforts Packages

Requirements for the contents of Good Faith Efforts Packages is contained in the Special Note included in the requests for proposals issued to prospective bidders on all highway construction projects receiving federal funds.

All Good Faith Efforts Packages shall be submitted to the Cabinet within ten (10) days of the receipt of notice that the contractor is the low bidder.

The Good Faith Efforts Packages will be evaluated for completeness by the Division of Construction Procurement in accordance with 49 CFR 26 and this DBE Program Plan. Good Faith Efforts Packages shall be presented to the Good Faith Efforts Committee members when they have been determined to be complete. The Division of Construction Procurement may request more information from the bidder prior to the presentation of the Good Faith Efforts Package to the Good Faith Efforts Committee.

#### 5. Administrative Reconsideration

Where the lowest responsive bidder fails to submit sufficient participation by DBE firms to meet the contract goal, and upon determination by the Good Faith Efforts Committee based upon the information submitted that the lowest responsive bidder failed to make sufficient reasonable efforts to meet the contract goal, the bidder will be offered an opportunity to meet in person for administrative reconsideration. The

reconsideration meeting will be held within two (2) business days of the receipt of a request from the bidder for reconsideration or on the first date on which the Good Faith Efforts Committee may meet.

The Office of the Secretary of the Cabinet or his/her designee will hear the request for reconsideration. The bidder will have the opportunity to present written documentation or argument concerning the issue of whether it met the goal or made an adequate good faith effort. The bidder will receive a written decision on the reconsideration explaining the basis for the finding that the bidder did or did not meet the goal or made adequate good faith efforts to do so.

The result of the reconsideration process is not administratively appealable to the Transportation Cabinet or the USDOT.

### **Prompt Payment and Retainage**

Prime contractors for the Cabinet shall be required to pay all subcontractors and material suppliers and other service providers, including non-DBE firms, within ten (10) calendar days after receipt of payment from the Cabinet for work performed, materials furnished or services provided on Federal-aid highway construction and design projects.

### **Over-concentration<sup>21</sup>**

The Cabinet shall review its DBE participation annually with respect to the areas of work in which DBE firms receive subcontracts. When there is an indication that DBE firms are performing work on USDOT-assisted contracts to an extent in which non-DBE firms are being excluded from that type of work, the Cabinet, following an investigation, shall take appropriate corrective action.

The Cabinet shall devise measures to address over-concentration of DBE firms once it has been clearly documented. Measures available to address over-concentration may include the use of incentives, technical assistance, business development programs, mentor-protégé programs and other appropriate measures designed to assist DBE firms to perform work in areas outside the area(s) of over-concentration. When areas of over-concentration have been documented to exist, the Cabinet shall take appropriate measures to address the over-concentration in conjunction with USDOT. The Cabinet shall notify prospective bidders on a project of any exception in the bid proposal.

### **Second-Tier Subcontracts**

Second-tier subcontracts between a subcontractor and a DBE firm may be approved by the Cabinet prior to the beginning of work on the second-tier subcontract. Second-tier subcontracts may be credited to the DBE goal established for a USDOT assisted contract.

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<sup>21</sup> 49 CFR 26.33

## **DBE Workforce and Supervision**

At least 50 percent (50%) of the work outlined in the subcontract shall be performed by the DBE subcontractor's work force.

A DBE subcontractor shall designate in writing a project superintendent who will supervise the subcontractor's work force daily. The project superintendent shall not be employed by any other contractor on the same project for the life of the project.

If the subcontractor rents equipment from another contractor, the rental agreement shall be in writing and approved by the Cabinet's resident engineer on the project.

If a DBE is the prime contractor on a project, which has participation goals established for the project, the work performed by the DBE shall count toward the participation goal.

If any certified DBE is found to be non-compliant with any of the requirements of the administrative regulations governing the DBE Program, the firm may have its certification suspended for a specific period of time. The Cabinet shall notify the certified DBE of the pending suspension. The notice shall specify the reasons for the pending suspension.

All suspensions are subject to review pursuant to KRS 13B.

## **XI. COUNTING DBE PARTICIPATION**

The Cabinet shall count DBE participation toward its overall and contract goals as provided in 49 CFR 26.55.

### **Value of Work Performed by the DBE**

When a DBE participates in a contract, the Cabinet shall count only the value of the work actually performed by the DBE toward DBE goals.

### **Termination and Replacement of DBEs**

No prime contractor on a USDOT-assisted contract shall terminate for convenience, a DBE subcontractor approved to meet a DBE contract goal (or an approved DBE substitute firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without the prior written consent of the Transportation Cabinet.

When a DBE subcontractor is terminated or fails to complete its work on a contract for any reason, the Cabinet shall require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal established for the procurement.

Certified DBE firms approved to meet Federal-aid contract goals may be replaced on a project only with the prior approval of the Cabinet.

### **Suppliers, Manufacturers and Brokers**

The prime contractor may count expenditures for materials and supplies obtained from certified DBE suppliers and manufacturers on which the DBE assumes actual and contractual responsibility for providing materials and supplies as follows:

The prime contractor may count its entire expenditure to a DBE manufacturer who operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the contractor;

If the materials or supplies are purchased from a DBE regular dealer, count sixty percent (60%) of the cost of the materials or supplies count toward DBE goals. A regular dealer is a person that owns, operates or maintains a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business.

Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

The prime contractor may count toward its DBE goal the following expenditures to certified DBEs that are not manufacturers or regular dealers:

- The fees or commissions charged for providing a bona fide service, such as professional, technical, consultant or managerial services, and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies required for performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services;
- The fees charged for delivery of materials and supplies required on a job site (but not the cost of materials and supplies themselves) when the hauler, trucker or delivery service is not also the manufacturer of, or a regular dealer in, the materials and supplies provided that the fee is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services; and
- The fees or commissions charged for providing any bonds or insurance specifically required for the performance of the contract, provided that the fee or commission is determined by the recipient to be reasonable and not excessive as compared with fees customarily allowed for similar services.

The prime contractor may count only expenditures to certified DBEs that perform a "commercially useful function" in the work of the specific contract toward the DBE participation goal established for the project.

### **Trucking Firms<sup>22</sup>**

The Cabinet will count for DBE credit the dollar value attributable to no more than twice the number of trucks on a contract owned by a DBE firm or leased from another DBE firm.

For example, if DBE Firm X owned two trucks, leased two others from another DBE firm and leased six others from a non-DBE firm, the DBE credit authorized for Firm X's participation would be equivalent to the dollar value of work attributable to eight trucks (four trucks owned or leased from DBEs, multiplied by two). DBE credit for the remaining two non-DBE trucks leased for the contract would be limited to fees and commissions received by the DBE firm pertaining to those two trucks.

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<sup>22</sup> 68 Fed. Reg. 3551 (June 16, 2003) and 49 CFR 26.55(d)(5).

The Cabinet shall use the following factors in determining whether a DBE trucking firm is performing a "commercially useful function":

- The DBE firm must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
- The DBE firm must itself own and operate at least one fully licensed, insured and operational truck used on the contract.
- The DBE firm receives credit for the total value of the transportation services it provides on a contract using trucks it owns, insures and operates using drivers it employs.
- The DBE firm may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE firm that leases trucks from another DBE firm receives credit for the total value of the transportation service the lessee DBE firm provides on the contract.
- The DBE firm may also lease trucks from non-DBE firms, including owner-operators. The DBE firm that leases trucks from a non-DBE firm is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE firm does not receive credit for the total value of the transportation services provided by the lessee since these services are not provided by a DBE firm.
- To be approved by the Cabinet, a lease must indicate the DBE firm has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE firm, so long as the lease gives the DBE firm absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE firm.

## **XII. CONTRACT PERFORMANCE MONITORING**

The Transportation Cabinet shall have primary responsibility for monitoring active Federal-aid contracts and enforcing the provisions of the DBE Program.

### **Monitoring of the Execution of Work by DBEs**

Construction field personnel are vital to the success of the Cabinet's DBE Program. Federal law requires that the work of DBE contractors be monitored in the field as part of the effort to assure that DBEs are actually performing the work.<sup>23</sup>

Resident engineers and inspectors are assigned the responsibility for monitoring the work of DBEs on a project-by-project basis. When monitoring DBEs, resident engineers shall:

- Know whether a project has a DBE goal and the amount of the goal;
- Know the names of any DBE contractors or suppliers who have contracts to work on the project;
- Know what work the DBE has been subcontracted to do;
- Keep apprised of the schedule for DBE work and notify the OCRSBD when the DBE is scheduled to be on the job;
- Monitor and document work performed by the DBE and note whether the work is being performed by employees of the DBE firm or by the prime contractor or another non-DBE firm;
- Ensure that certified payrolls are promptly provided by DBE firms;
- Confirm that DBE subcontractors are in compliance with 49 CFR 26 concerning ownership and leasing of equipment; and
- Notify immediately the DBELO of any irregularities or issues that arise with regard to a DBE work item.

Daily inspection reports shall reflect the activities of the DBE firm, including the number and classification of personnel working on the job.

The Cabinet may monitor the work of any DBE. Other agencies, including civil rights authorities, the Federal Highway Administration, the Division of Construction Procurement, the Office of Legal Services and the Office of the Inspector General (OIG) of the Cabinet may monitor the work of DBEs and contractors as necessary.

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<sup>23</sup> 49 CFR 26.37(b).

Monitoring by other divisions or agencies does not alleviate the need or lessen the responsibility for resident engineers and inspectors to monitor the work of DBEs.

### **Tracking of Payments made to DBEs**

The Division of Construction is primarily responsible for seeing that payments are made to prime contractors for work performed on highway construction and maintenance projects. As part of those duties, the Division of Construction is also responsible for the confirmation of payments made to DBE subcontractors.

The Cabinet requires that prime contractors pay DBE subcontractors for satisfactory performance within ten (10) calendar days of the receipt of payment from the Cabinet.<sup>24</sup>

Problems with payment by prime contractors should be reported to the Division of Construction at 502/564-4780.

The federal regulation, 49 CFR 26 requires the Cabinet to confirm that payments made to DBEs equal the awards and commitments reflected in contracts containing DBE goals. A running tally of contract commitments and payments to DBE subcontractors is maintained by the Cabinet to confirm the status of payments to each DBE.<sup>25</sup>

Prime contractors must incorporate a requirement into DBE subcontracts, including supply contracts, requiring DBEs to provide the Division of Construction with a copy of all checks received from the prime contractor within ten (10) calendar days of receipt of payment for work performed on Transportation Cabinet projects. Copies of checks to DBE subcontractors must include the PCN number, estimate number, subsection sequence code and quantity for which the check was written.

### **DBE Suppliers and Brokers**

The Cabinet allows the use of DBE suppliers for credit toward DBE goals, provided they meet the criteria found at 49 CFR 26.55(e). DBE suppliers shall provide information confirming that they are a “regular dealer” and can perform a “commercially useful function” as a supplier. “Commercially useful function” is considered in determining whether the contributions of suppliers and brokers may be counted toward the DBE goal.<sup>26</sup>

Sixty percent (60%) of the cost of items supplied by a certified DBE supplier may be counted toward a DBE project goal.

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<sup>24</sup> 49 CFR 26.29.

<sup>25</sup> 49 CFR 26.37.

<sup>26</sup> 49 CFR 26.73(a).



1. Regular Dealer

In order to be considered a *regular dealer* in the specific materials supplied, the DBE must:

- Own, operate or maintain a store, warehouse or other establishment in which the materials, supplies, articles or equipment of the general character described in the contract specifications are bought, kept in stock, and are regularly sold or leased to the public in the usual course of business; and
- Be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the materials, supplies, articles or equipment in question.

2. Bulk Items

Bulk items such as petroleum, cement, gravel, stone or asphalt may be supplied by a DBE who both owns and operates distribution equipment for the products.

Approval of Items Supplied

The DBE must show that it is a *regular dealer* of each item to be supplied and that it is capable of performing the work that it is seeking to be certified to do.

3. Commercially Useful Function

In order to have their work counted toward the DBE goal, suppliers must perform a "commercially useful function" on the project. To perform a "commercially useful function" in the transaction, the DBE must demonstrate that it will be responsible for the execution of the work of the contract and meet its responsibilities by actually performing, managing and supervising the work involved.

The DBE supplier must demonstrate that it is responsible for the following:

- Negotiating price;
- Determining quality and quantity;
- Ordering materials;
- Installation (if applicable);
- Paying for the materials;
- Assuming the risk of loss for the materials until they are accepted by the prime contractor for use on the job. (Obtaining insurance for the risk of loss in transport is an indication of assumption of risk); and

- The price paid for the work must be commensurate with the work performed to supply the materials.

#### 4. Dos and Don'ts of DBE Suppliers

If the firm is a prime contractor seeking to use a DBE supplier to meet a DBE contract goal or a potential supplier, ask the following questions:

- Does the “firm” order, assume ownership and the risk of loss of supplied items during transit? If not, then the “firm” is really a broker and only the brokerage fee can be counted.
- Is the “firm” responsible for transporting the items either with their own equipment or through a long-term lease? If so, they are likely to be a supplier, if not, then the DBE is likely acting as a broker.

#### 5. Leases by Suppliers

Suppliers who are *regular dealers* in the items they supply, but who do not own the equipment necessary to deliver the items, must have a lease agreement with the provider of the transportation equipment in order for the transportation costs associated with supplying the item to be counted toward the DBE goal.<sup>27</sup>

The following are requirements for the lease of transportation equipment by the DBE:

- The lease must be in effect prior to the date of the letting of the contract.
- A lease must indicate that the DBE has exclusive use of and control over the vehicle(s) leased. This requirement does not preclude the leased vehicle(s) from working for others during the term of the lease with the consent of the DBE, as long as the lease gives the DBE priority for use of the leased vehicle(s).
- Leases must be for a definitive period. Leases cannot be on an ad hoc basis or for a single project. The purpose of this provision is to show a regular, ongoing relationship between the lessor and the DBE.
- The lease may include provisions for the lease of a driver/operator.
- The lease must address the price to be charged the DBE for use of the transportation and distribution equipment. This provision need not state the exact pricing but may consist of a means of calculating the rate.
- Both parties must sign the lease.

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<sup>27</sup> 49 CFR 26.55(e) and 64 Fed. Reg. 5096 (February 2, 1999).

6. Brokers<sup>28</sup>

Brokers, repackagers, packagers and manufacturer's representatives or other persons who arrange or expedite transactions, are not *regular dealers* and their contributions shall not be counted as those of suppliers. Brokers may be utilized for DBE credit, however, only the dollar value of the commission paid to the broker can be applied toward the goal, provided that the fees or commissions are reasonable for the work performed.

Examples:

If the prime contractor utilizes the services of a DBE to provide bridge beams to a \$30 million project and pays a 1 percent (1%) commission on \$3 million worth of beams to the DBE to handle the paperwork, then the prime contractor may apply \$30,000 toward the DBE goal. In this scenario, the DBE does not have responsibility for the ordering or transportation of the beams, nor does it assume the risk of loss in transit.

On the other hand, if the DBE arranges transport with the manufacturer, takes ownership and assumes the risk of loss for the beams in transit, arranges the transportation with his own forces or through long-term lease and supervises the delivery, then that DBE is a legitimate supplier and may count \$1.8 million (60%) toward the DBE goal.

### **Requirements for DBE Manufacturers**

A firm may count one hundred percent (100%) of the dollar value of the cost of materials or supplies produced by a DBE manufacturer.<sup>29</sup>

A manufacturer is a firm that operates or maintains a factory or establishment on the premise that produces the materials, supplies, articles or equipment required under the contract and of the general character described in the contract specifications.

The Cabinet shall, during the certification process, assess a DBE's ability to meet the requirements of a DBE manufacturer. The DBE manufacturer shall demonstrate that it has the facilities, means and expertise to manufacture any item for which it presents itself to be a manufacturer. The DBE manufacturer shall also be required to provide proof that it operates the manufacturing facility independently.

A "manufacturer" who attempts to set up a precast concrete manufacturing facility on property owned and controlled by an established pre-cast manufacturer, will be required to show that it is not dependent upon the established company for its existence or success.

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<sup>28</sup> 49 CFR 26.55(e)(3).

<sup>29</sup> 49 CFR 26.55(e)(1)(i).

## **Corrective Action**

Areas of non-compliance within the DBE Program will be documented by the Cabinet and appropriate corrective action recommended when necessary. On documented cases of non-compliance, the Cabinet will notify the prime contractor in detail of the noted deficiencies and the action necessary to remedy or correct these deficiencies. Failure of the prime contractor to correct noted deficiencies may result in:

- (a) Withholding progress payments;
- (b) Sanction and/or reprimand;
- (c) Termination of contract; or
- (d) Other actions as appropriate.

### **XIII. RESPONSIBILITIES OF THE DIVISION OF CONSTRUCTION PROCUREMENT**

The Division of Construction Procurement is primarily responsible for the advertising, letting, award and administration of highway construction contracts. This responsibility also encompasses duties related to the administration of the contractual aspects of the DBE Program.

#### **Prequalification of DBEs**

All contractors, subcontractors and DBEs who propose to do work with the Cabinet must obtain a Certificate of Eligibility to contract<sup>30</sup> or obtain a waiver of the requirement from the Cabinet. The Certificate of Eligibility requirement is separate from, and unrelated to, the DBE certification. DBEs must be prequalified and certified prior to the letting of any contract on which they wish to participate for DBE credit. The process of obtaining a Certificate of Eligibility is conducted through the Division of Construction Procurement.

#### **Compilation of the Notice to Contractors and Bid Proposal**

The Division of Construction Procurement must issue a Notice to Contractors at least twenty-one (21) days prior to the letting of any federal highway contract for bid. The notice includes the DBE project goal on federally-funded projects. The Division of Construction Procurement is responsible for the compilation of the bid proposal, which includes the Special Note applicable to the DBE goal.

#### **Monitoring of the Bidding Process**

An official from the Division of Construction Procurement monitors the bidding process. This official shall confirm that all bidders have certified their DBE participation in their bids for projects when a DBE goal has been established.

Bids submitted that do not include certification of DBE participation will not be considered for award by the Cabinet and will be returned to the bidder.

#### **Review and Approval of DBE Contracts and Subcontracts**

The Division of Construction Procurement, in consultation with the Division of Construction, has the responsibility and authority to approve all subcontracts for firms on construction contracts, including DBEs.

With regard to contracts for consultant design, the Division of Professional Services has the responsibility and authority to approve all subcontracts, including DBE subcontracts, in consultation with the user Division.

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<sup>30</sup> Kentucky Revised Statutes 176.140. This process is also known as “prequalification”.

The Office for Civil Rights and Small Business Development (OCRSBD) is available as a consultant to confirm DBE certification and DBE abilities.

### **Good Faith Efforts**

The Division of Construction Procurement, in consultation with OCRSBD, has primary responsibility for the review of all submittals of requests for determinations of Good Faith Efforts by prime contractors on Cabinet projects. The Division of Construction Procurement makes a determination of completeness and reviews Good Faith Efforts Packages, then makes recommendations to the Good Faith Efforts Committee for consideration.

#### **XIV. MANAGEMENT OF REPORTS OF POTENTIAL DBE PROGRAM VIOLATIONS**

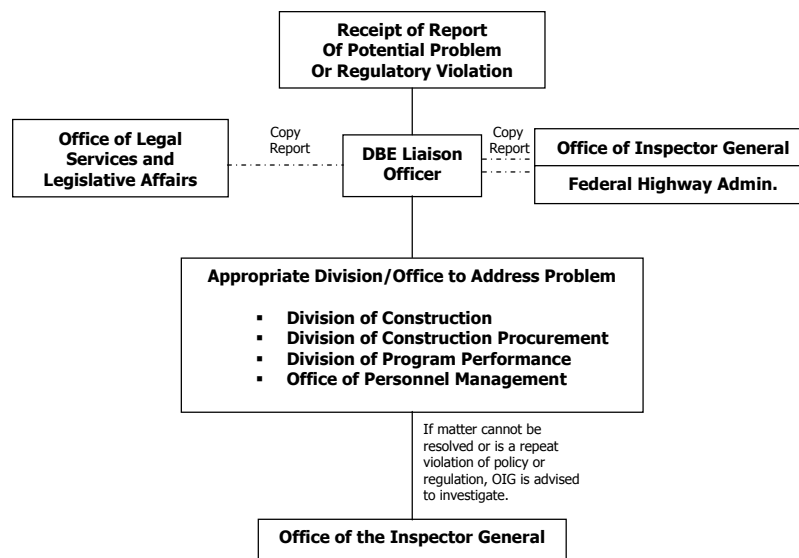
The Division of Construction, the Division of Construction Procurement and the OCRSBD have the responsibility for monitoring compliance with 49 CFR 26. Non-DBE and DBE contractors are equally responsible for compliance. All of these entities shall be responsible for reporting incidences of non-compliance with the regulations.

The recipient of a problematic report related to the conduct of DBEs, contractors or others regarding the DBE Program, shall forward the information to the DBELO. The DBELO shall work with the appropriate division of the Cabinet (Construction, Construction Procurement, OCRSBD, etc.), the DBE and the prime contractor to address the reported problem.

The DBELO shall copy all reports of regulatory violations related to the DBE Program to the OIG, the Office of Legal Services and the Division Office of the Federal Highway Administration.

If the problem cannot be resolved or if the alleged violator has been involved in prior DBE Program violations, the OIG and Office of Legal Services shall be notified immediately. The OIG may determine at any time that a report of alleged wrongdoing warrants an investigation by the OIG. The OIG may issue a report of findings and make appropriate recommendations. Potential criminal violations will be referred to the appropriate authorities.

##### **Management of Reports of DBE Program Violations**



## **XV.      ROLE OF THE OFFICE OF THE INSPECTOR GENERAL**

Issues involving reports of wrongdoing and serious violations of the DBE Program will be referred to the Transportation Cabinet's OIG. If the OIG determines it appropriate, it may conduct an investigation of the reported incident. If the OIG determines that violations have occurred, then it may recommend that action be taken against contractors, DBEs or Cabinet personnel involved.

If the OIG determines that criminal activity may have occurred, the matter shall be reported to the appropriate law enforcement agency for investigation.



## **XVI. RECORD KEEPING AND REPORTING**

The Cabinet shall maintain such records and provide DBE Program data as directed by the USDOT and its operating administrations as required by 49 CFR 26.11 of the governing Federal regulations. This shall include monthly, quarterly, extraordinary and annual reports.

All contractors and subcontractors shall maintain such records as are necessary to ensure DBE Program compliance and shall maintain such records for at least three (3) years following the completion of the contract. Such records shall be available for inspection by the Cabinet, USDOT and its administration representatives or federal law enforcement agencies, departments and officials upon request.

The Cabinet shall maintain strict confidentiality with regard to all personal financial information submitted by applicants for DBE Program certification. Personal financial information submitted to the Cabinet may be provided to a third party only with the written consent of the individual to whom the information pertains.

## **XVII. PUBLIC PARTICIPATION**

The Cabinet continuously consults with minority, women, general contracting groups, fraternal, community and educational organizations, as well as, other organizations and officials who could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on the opportunities for DBE firms and the Cabinet's efforts to level the playing field with respect to the participation of DBE firms.

The Cabinet publishes a legal notice in the major print media (including minority-focused) within the Commonwealth announcing its proposed overall DBE Program goal and the methodology by which it is derived. The goal and its rationale are available for public inspection during normal working hours (8:00 a.m. to 4:30 p.m.) at the OCRSBD for thirty (30) days following the date of the notice. The legal notice also informs interested parties that the Cabinet (and the Kentucky Division Office, Federal Highway Administration) will accept public comments for a period of forty-five (45) days from the date of the notice.

The Cabinet conducts regional public hearings on its DBE Program goal, and any changes to the DBE Program. The Cabinet will provide adequate public notice of all hearings through general circulation media and minority-focused media, as well as, contractors' organizations, DBE firms, highway contractors and other affected organizations, groups and individuals.

## **XVIII. DEFINITIONS**

NOTE: Additional definitions applicable to the DBE Program may be found in 49 CFR 26.5 [www.fhwa.dot.gov/hep/49cfr26.htm#sec.26.5](http://www.fhwa.dot.gov/hep/49cfr26.htm#sec.26.5) and 600 KAR. 4:010 [www.lrc.ky.gov/kar/600/004/010.htm](http://www.lrc.ky.gov/kar/600/004/010.htm)

**Affiliation** has the same meaning the term has in the Small Business Administration (“SBA”) regulations, 13 CFR Part 121. The calculation of a business concern’s size includes the employees or receipts of all affiliates. Affiliation with another business concern is based on the power to control, whether exercised or not. Such factors as common ownership, common management and identity of interest (often found in members of the same family) among others, are indicators of affiliation. Power to control exists when a party or parties have fifty percent (50%) or more ownership. It may also exist with considerably less than fifty percent (50%) ownership by contractual arrangement or when one or more parties own a large share compared to other parties. The affiliated business concerns need not be in the same line of business.

(a) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:

- i. One concern controls or has the power to control the other; or
- ii. A third party or parties control or has the power to control both; or
- iii. An identity of interest between or among parties exists such that affiliation may be found.

(b) In determining whether affiliation exists, it is necessary to consider all appropriate factors including common ownership, common management and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE Program.

**Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**Alaska Native Corporation** (ANC) means any Regional Corporation, Village Corporation, Urban Corporation or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq).

**Annual Receipts** means the business concern’s gross or total income, plus cost of goods sold, as defined by or reported on the concern’s Federal Income Tax return. The term does not include, however, net capital gains or losses, or taxes collected for and remitted to a taxing authority if included in gross or total income. The business concern

may not deduct income taxes, property taxes, cost of materials or funds paid to subcontractors. Travel, real estate and advertising agents, providers of conference management services, freight forwarders, customs brokers and tour operators may deduct amounts they collect on behalf of another. If a concern has not been in business for three (3) years, the average weekly revenue for the number of weeks the concern has been in business is multiplied by fifty-two (52) to determine its average annual receipts.

**Applicant or Firm** means any corporation, partnership, sole proprietorship or joint venture applying with the Transportation Cabinet for certification or continuation as a disadvantaged business enterprise.

**Approval** means that the applicant has been determined by the DBE Certification Committee to meet the disadvantaged business enterprise eligibility criteria as outlined in 49 CFR 26.

**Cabinet** means the Kentucky Transportation Cabinet.

**Certification** means the process whereby the Cabinet determines if an applicant meets the disadvantaged business enterprise criteria set forth in 49 CFR 26.

**Challenge** means an action in which a third party questions the socially and economically disadvantaged status of certified DBE program participant or applicant for DBE certification.

**Commercially useful function** means a DBE performs a “**Commercially useful function**” when it is responsible for the execution of the work of a contract and is carrying out its responsibility by actually performing, managing and supervising the work involved. With respect to furnishing materials and supplies as part of the DBE contract, the DBE performs a "commercially useful function" when the DBE is responsible for negotiating price, determining quality and quantity, ordering materials and installing (where applicable) and paying for the material itself. A DBE does not perform a "commercially useful function" if its role is limited to that of an extra participant in a transaction, contract or project through which funds are passed in order to obtain the appearance of DBE participation. See also 49 CFR 26.55.

**Compliance** means that a recipient has correctly implemented the requirements of 49 CFR 26.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. A lease is considered to be a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit or airport program.

**Department or (USDOT)** means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

**Disadvantaged Business Enterprise or (DBE)** means a for-profit small business concern:

- (a) That is at least 51 percent (51%) owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent (51%) of the stock is owned by one or more such individuals; and
- (b) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**Good Faith Efforts** means efforts to achieve a DBE goal or other requirement of 49 CFR 26 which, by their scope, intensity and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Immediate Family Member** means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law or father-in-law.

**Indian Tribe** means any Indian tribe, band, nation or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group or community resides. See definition of "Tribally-owned Concern" in this section.

**Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii.

**Native Hawaiian Organization** means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

**Noncompliance** means that a recipient has not correctly implemented the requirements of 49 CFR 26.

**Operating Administration or (OA)** means any of the following parts of USDOT: The Federal Aviation Administration (FAA), Federal Highway Administration (FHWA) and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

**Personal Net Worth (PNW)** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: the individual's ownership interest in an applicant or participating DBE firm, or the individual's equity in his or her primary place of residence. An individual's personal net

worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

**Prequalified or Prequalification** refers to the process or receipt of a certificate of eligibility issued by the Cabinet. Firms doing business with the Cabinet must be prequalified and issued a certificate of eligibility to contract with the Cabinet in accordance with KRS 176.140 and the regulations found at 603 KAR 2:015 (highway construction) and 600 KAR 6:040 (professional services).

**Primary Industry Classification** means the North American Industrial Classification System (NAICS) which best describes the primary business of a firm. The NAICS is described in the North American Industry Classification Manual – United States, which is available from the National Technical Information Service, Springfield, VA.

**Primary Recipient** means a recipient that receives USDOT financial assistance and passes some or all of it on to another recipient.

**Principal Place of Business** means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE Program purposes.

**Program** means any undertaking on a recipient's part to use USDOT financial assistance, authorized by the laws to which 49 CFR 26 applies.

**Race-conscious** measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-neutral** measure or program is one that is, or can be, used to assist all small businesses. For the purposes of 49 CFR 26, *race-neutral* includes gender-neutrality.

**Recipient** is any entity, public or private, to which USDOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA or who has applied for such assistance.

**Regular dealer** means a firm that owns, operates, or maintains a store, warehouse or other establishment in which the materials, supplies, articles or general equipment of the general character described by the specifications and required under the contract are bought, kept in stock and regularly sold or leased to the public in the usual course of business. To be a *regular dealer*, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question. A regular dealer may not act exclusively as a supplier for contractors on Federal-aid highway construction projects. A person may be a *regular dealer* in bulk items, such as rock and asphalt, without owning, operating or maintaining a place of business as provided above, if the person both owns and operates distribution equipment for the products.

**Secretary** means as appropriate either the Secretary of Transportation of USDOT, the Kentucky Transportation Cabinet or their designee.

**Set-aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small business concern** means, with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to Section 3 of the Small Business Act and Small Business Administration (“SBA”) regulations implementing it, 13 CFR Part 121, that also does not exceed the cap on average annual gross receipts specified in 49 CFR 26.65(b).

**Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is (1) found by a recipient to be socially and economically disadvantaged on a case-by-case basis; or (2) an individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

- (a) “Black Americans” which includes persons having origins in any of the Black racial groups of Africa;
- (b) “Hispanic Americans” which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American or other Spanish or Portuguese culture or origin, regardless of race;
- (c) “Native Americans” which includes persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;
- (d) “Asian-Pacific Americans” which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia or Hong Kong;
- (e) “Subcontinent Asian Americans” which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
- (f) Women;
- (g) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

**Subcontractor** means an individual firm, or corporation who, with the written consent of the Department, subcontracts any part of the contract. First tier subcontractors are those to whom a contractor subcontracts a portion of the work. Second tier subcontractors are those to whom a first tier subcontractor subcontracts a portion of the work.

***Tribally-owned concern*** means any concern at least 51 percent (51%) owned by an Indian tribe as defined in 49 CFR 26.

***USDOT-assisted contract*** means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

## APPENDICES

- ▶ Department of Transportation - 49 CFR Parts 23 and 26 Federal Registers  
<http://transportation.ky.gov/Civil-Rights-and-Small-Business-Development/Pages/SmallBusinessHome.aspx>
- ▶ UCP Application  
[http://www.dot.gov/sites/dot.dev/files/docs/DBE\\_Uniform\\_Certification\\_Application.pdf](http://www.dot.gov/sites/dot.dev/files/docs/DBE_Uniform_Certification_Application.pdf)
- ▶ Disadvantaged Business Enterprise Personal Financial Statement  
[http://www.dot.gov/sites/dot.dev/files/docs/SBA\\_413\\_2014.pdf](http://www.dot.gov/sites/dot.dev/files/docs/SBA_413_2014.pdf)
- ▶ U. S. Small Business Administration Table of Small Business Size Standards Matched to Northern American Industry Classification System Codes [www.sba.gov/content/small-business-size-standards](http://www.sba.gov/content/small-business-size-standards)

## FORMS:

The forms used in relation to the DBE Program and SBE Program are subject to modification from time to time. Please check the Kentucky Transportation Cabinet website at <http://www.transportation.ky.gov> for current information impacting the DBE and SBE Programs or call the phone number(s) indicated.

**Available through the Office for Civil Rights and Small Business Development at 502-564-3601:**

DBE Certified and Prequalified Directory  
DBE Program Plan  
Unified Certification Program (UCP) Application Packet  
SBE Program Application Packet

**Available through the Division of Construction Procurement at 502-564-3500:**

Certificate for Eligibility or Continuation Prequalification Packet  
DBE Detail Participation Plan  
General DBE Participation Plan  
Prequalified Contractors List